83-74

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 19 ____

No. _____

In Re Bankruptcy of DAVID M. POSNER,

Bankrupt.

DAVID M. POSNER, Plaintiff/Appellee,
Respondent

vs.

SAM TABONE, Defendant/Appellant,
Petitioner

In Re Bankruptcy of LEO CHARLES WEISKIRCHER,

Bankrupt.

LEO CHARLES WEISKIRCHER, Plaintiff/Appellee,
Respondent

vs.

SAM TABONE, Defendant/Appellant,
Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
AND APPENDIX

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QUESTIONS PRESENTED

The Court of Appeals stated that the issues on review (questions presented) were: (See Appendix).

(a) Did the Bankruptcy Court or the District Court err in voiding the unrestricted in personam state court judgment obtained by Tabone?

(b) Did the Bankruptcy Court or the District Court abuse its discretion by voiding the post-bankruptcy state court judgment rather than reforming or limiting it?

Petitioner contends that such questions or issues present the ultimate conclusions. They do not present the several issues or questions involved in the case. Therefore, petitioner sets forth the following as the questions or issues presented for review and decision.

1. Under California State Law, is an attachment of real property a lien not avoidable in bankruptcy when the lien is

perfected more than four months prior to filing for bankruptcy?

2. Where the State Court action is commenced to recover an unsecured debt, does the attachment lien obtained upon real property more than four months prior to filing for bankruptcy transfer the debt from unsecured to a secured debt?

3. Under the circumstances stated in numbers 1. and 2., above, does Rule 401 or Rule 406, Rules of Bankruptcy Procedure, apply? Or does neither rule apply?

4. Under the circumstances stated in numbers 1. and 2., above, where the judgment is obtained against the bankrupts after the filing for bankruptcy, is the debt or judgment debt secured or unsecured by the attachment lien, and does Rule 401 or Rule 601 apply? Or does neither rule apply?

5. Under the circumstances stated in numbers 1, 2 and 4, above, and if the debt or judgment debt is secured by the attach-

ment lien, under the rule that the security must be applied to the satisfaction of the judgment, must the judgment creditor obtain a restricted judgment, or may he obtain an unrestricted judgment, keeping in mind that a secured judgment debt has the same force and effect as a judgment restricted to enforcement against the property attached? Is not the real issue a question of enforcement and not whether or not the judgment is restricted?

6. Under the circumstances mentioned above, do the issues present matters of substance over which the Bankruptcy Court or the District Court has no discretion but to restrict enforcement, and not void the judgment in its entirety, on the grounds that the judgment was legally restricted expressly and/or impliedly by the Bankruptcy Act, laws and rules of procedure to enforcement solely against the property attached?

The questions presented are unsettled questions of law which are of utmost interest to the Bankruptcy Courts, creditors and bankrupts, attorneys at law, State Courts, and the public at large. Since there are no court precedents directly in point, the United States Supreme Court is urged to settle those questions at this time.

In line with that here, the bankrupts at no time scheduled the attached property, nor mentioned the attachment lien in their bankruptcies, and, thus, the property attached remained in the custody of the State Court and outside the scope of the Bankruptcy Court's jurisdiction.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The above-entitled proceedings in the U. S. Court of Appeals for the Ninth Circuit have the following case numbers:

Civil Case No. CA No. 81-5229
DC No. CV 80-1226-FW
BK. No. 79-5766-JM
CA No. 82-5226 and 82-5227
DC No. CV 80-1304-WMB; CV 80-2342-WMB
BK. No. 77-06515-WL
CENTRAL CALIFORNIA
CONSOLIDATED CASES ON APPEAL
SINGLE BRIEF

INTRODUCTION

Petitioner prays that a writ of certiorari issue to review the judgment (Opinion) of the United States Court of Appeals for the Ninth Circuit entered on March 7, 1983.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is in the Appendix hereto, and is not yet reported in the official reports to petitioner's knowledge.

JURISDICTION

The judgment (Opinion) in the Appendix hereto, which is sought to be reviewed is dated, filed and entered on March 7, 1983.

No petition for rehearing was filed.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

List of Parties: The caption of the case in this Court contains the names of all parties.

STATEMENT OF CASE

Petitioner Tabone commenced a California State Court action against respondents Posner and Weiskircher to recover an unsecured debt. More than four months prior to Posner and Weiskircher filing for bankruptcy, Tabone perfected an attachment lien on their real properties to secure the payment of the debt. After Posner and Weiskircher filed for bankruptcy, Tabone obtained judgment against them and levied execution solely on the properties attached to satisfy the judgment. The judgment was not restricted or limited by its terms.

None of the real properties attached were scheduled in the bankruptcy petitions or proceedings at any time.

Posner and Weiskircher then filed complaints in the Bankruptcy Court to void the judgment and to recall and quash the execution. They did not contest the

attachment or the attachment lien. The bankruptcy court found that the attachment liens were perfected more than four months prior to bankruptcy; the execution of the judgment was made solely on the attached properties; and that the judgment was unrestricted without limitation as to its enforcement; and adjudged that the State Court judgment was void pursuant to 11 U.S.C. 32 and Rule 401(a)(b).

Tabone appealed to the District Court, Central District of California. That court affirmed the Bankruptcy Court's judgment holding in substance and effect that although Tabone did perfect an attachment lien more than four months prior to bankruptcy, the State Court judgment was unqualified and though the Bankruptcy Court had power to reform or limit it to enforcement only against the property attached, the Bankruptcy Court did not abuse its discretion in voiding the judgment, applying Rule 401(a) as a basis for affirmance.

Tabone appealed from the District Court's judgment to the Untied States Court of Appeals for the Ninth Circuit. That Court affirmed (a) holding that the perfected attachment lien secured the judgment and not the debt, which were not secured debts on the dates bankruptcy was filed, which made the judgments void under Rule 401, (b) further holding that the District Court did not abuse its discretion in refusing to limit the judgment, (c) That Court further noted in its footnote 8 that an attachment lien creditor (more than four months prior to bankruptcy) may take a limited judgment solely against the attached property, but not against the bankrupt or other of his property. (Petitioner's Comment: It is obvious to petitioner that holding (a) is inconsistent with holding (b) and (c). If the debt is unsecured at the time of bankruptcy, the Court would have no discretion at all to limit it, whereas that

Court held that under proper facts the Court has the equitable power to limit it; and then goes on to say in (c) that the creditor may take a limited judgment to be satisfied solely against the attached property.

The Opinion of the U.S. Court of Appeals for the Ninth Circuit is in the Appendix hereto marked A.

REASONS FOR ALLOWANCE OF THE WRIT

The reasons or grounds for allowance of the Writ are:

1. Since the facts are not in dispute, this Court is urged to settle questions of law.

2. It appears necessary to secure uniformity of decision, or settlement of important questions of law.

3. Substantial issues of law appear to have been incorrectly stated, and appear not to have been considered.

4. The following are further reasons for allowance of the Writ.

ARGUMENT

I

AN ATTACHMENT LIEN PERFECTED MORE THAN FOUR MONTHS PRIOR TO BANKRUPTCY IS NOT VOIDABLE IN BANKRUPTCY.

It is well established that an attachment lien perfected more than four months prior to bankruptcy may not be voided by the Bankruptcy Court.

Bankruptcy Act, section 67(a)(1)

Bank of South San Francisco v. Pike (1921) 53 Cal.App. 524, 527, 200 P.752

Sparks v. Buckner (1936) 14 Cal.App.2d 213, 223, 57 P.2d 1395

Here, Tabone perfected his uncontested attachment lien more than four months prior to bankruptcy, and the Bankruptcy Court so found. It may not be voided by the Bankruptcy Court.

II

A PERFECTED ATTACHMENT LIEN MORE THAN FOUR MONTHS PRIOR TO BANKRUPTCY TRANSFERS THE DEBT FROM UNSECURED TO SECURED.

The more than four months attachment lien creditor may pursue attached property to judgment in the State Courts subsequent to the debtor's discharge in bankruptcy.

Bass v. Stodd (9th Cir. 1966) 357 F.2d 458

A & E Plastik Pak Co. v. Bowie (9th Cir. 1966) 358 F.2d 148

And pursuing the claim to judgment may not be enjoined, because the lien arises at the time of the original attachment, and levy of execution of the judgment on the attached property creates a judgment lien by relation back to the date of the attachment, in which case the Bankruptcy Court does not have jurisdiction of both the attachment and the judgment. The attachment levied creates an unconditional right of payment of judgment out of the property

attached, an actual lien not subject to defeat by the Bankruptcy Court.

Sparks v. Buckner (1936)

14 Cal.App.2d 213, 223, 57 P.2d, 1395

The Peck v. Jenness Court (1849) 7 How. (U.S.) 612, 12 L.Ed. 841, cited in Smith v. Davis (1932) (Me.) 158 Atl. 359, and a host of cases cited to the same effect in 81 ALR pages 78-85 annotations, said the lien creditor shall be permitted to have his satisfaction out of the property attached or liened. A legal right without a remedy would be an anomaly in the law. While it discharges the defendant from personal liability, it saves to plaintiffs their remedy, and awards their satisfaction out of the property attached, and not otherwise.

Although Peck predated the amendments to the Bankruptcy Act on and after 1970, the amendments did not change the substantive law.

If the attachment lien creates an unconditional right of payment out of the

property attached then it logically follows that the property attachment lien secures the payment of the debt when reduced to judgment. It does not logically follow, as the Court of Appeals stated in its Opinion , page 4, line 18, that the attachment lien "secures the judgment, not the unsecured provable debt", because the judgment merges the debt as of the date of the attachment by relation back, and payment is secured by the property attachment lien. The situation is no different than had the respondents given Tabone a deed of trust more than four months prior to bankruptcy and a judgment of judicial foreclosure had taken place after bankruptcy.

The logical conclusion is that the attachment lien secures payment of the debt out of the property attached, and in that sense the debt is secured.

III

IF ANY BANKRUPTCY RULES OF PROCEDURE APPLY HERE, RULE 601 AND NOT RULE 401 WOULD APPLY. HOWEVER, NEITHER RULE APPLIES HERE.

Tabone contends the payment of the debt owed him was secured by the prior attachment lien in which case Rule 401 (applicable only to unsecured provable debts) is not applicable here.

Rule 601 applies to liens obtained by attachment on property in the custody of the Bankruptcy Court, and within four months of bankruptcy.

For at least three reasons Rule 601 does not apply here. The property attached was not scheduled in bankruptcy, was not in the custody of the Bankruptcy Court, and was attached more than four months prior to bankruptcy.

Additionally, the attachments and the attachment liens obtained upon the debtors' property were not scheduled in their

bankruptcies.

The attached properties were at all times in the sole and exclusive custody of the Sheriff who levied the writs of attachment.

Bass v. Stodd (9th Cir. 1966) 357 F.2d 458, supra.

A & E Plastik Pak Co. v. Bowie (9th Cir. 1966) 358 F.2d 148, supra.

IV

IF THE PAYMENT OF THE DEBT IS SECURED BY AN ATTACHMENT LIEN OBTAINED MORE THAN FOUR MONTHS PRIOR TO BANKRUPTCY, THE REAL ISSUE IS THE QUESTION OF ENFORCEMENT AND NOT WHETHER THE JUDGMENT OBTAINED AFTER BANKRUPTCY IS RESTRICTED OR GENERAL.

The relevant bankruptcy laws, whether impliedly or expressly, became a part of the State Court judgment obtained by Tabone, whether or not the judgment is general or restricted. If restricted, the restriction is merely a restatement of applicable

bankruptcy rules and law. If not restricted applicable bankruptcy law and rules govern its enforcement.

As to the adoption of the Amendment to the National Bankruptcy Act, the accompanying Senate Report and explanatory memorandum, which includes attachment liens, states

> "These directives apply only to the personal liability of the bankrupt upon discharged debts, and, therefore, would not apply in those situations where judgments may be necessary under State Law to enforce valid secured claims upon particular collateral." (S. Rep. No. 1173, 91st Cong., 2d Sess. 11 (1970)).

Thus, the Tabone judgment, though not restricted by its terms, was legally restricted to enforcement by execution only upon the property previously attached, and not otherwise, which the evidence here shows that was what Tabone did.

The argument that the Tabone judgment

is void because it can be enforced against the debtors' personal liability is based upon a false premise for the reasons stated above.

In view of the above, the enforcement of Tabone's judgment was restricted by law. Any attempt to enforce it by other means or in any other way would be in contempt of the Bankruptcy Court.

V

THE BANKRUPTCY AND THE DISTRICT COURTS HAD NO DISCRETION BUT TO DECLARE THAT THE ENFORCEMENT OF THE JUDGMENT WAS RESTRICTED BY LAW AND NOT VOID IT.

The issues of attachment liens perfected more than four months prior to bankruptcy; the obtaining of judgment which merged the debt, and/by execution relation back becomes a lien on the attached property as of the date of attachment; that the lien secures (the payment of) the debt; that the enforcement of the judgment is restricted by law upon the property previously attached; are all

matters of substance and not of discretion. The holding that it was discretionary for the Bankruptcy and District Courts to void or restrict the Tabone judgment was clearly erroneous. By law it was automatically restricted and it was the duty of said Courts to declare that to be the case and not void the judgment.

As previously stated, the holding of the Court of Appeals that it was discretionary for the Court to reform or void Tabone's State Court judgment (OPINION, APPENDIX, page 6), was clearly erroneous, because if the debt was unsecured on the date bankruptcy was filed as the Court of Appeals stated, the Court as a matter of law had no discretion to reform or void. There was nothing to reform, as I view it, because the Court cannot reform an unsecured provable debt or judgment.

Because of the actual lien obtained by attachment, the debt was secured and the Court had no discretion, but to declare that the judgment and its enforcement was

restricted by law upon the property attached. The Court had no discretion to void the judgment.

The Court of Appeals stated that in Becker v. S.P.V. Construction Co. 27 Cal. 3d 489, 612 P.2d 915, 165 Cal.Rptr. 825 (1980) the plaintiffs violated no substantive rule or statute in seeking a default judgment (Op. pp. 6-7). The court's view of Becker was erroneous. The default judgment in Becker violated California decisions/laws and statute similar to Federal law, (FRCP Rule 52(c), 60 (a)(b), 62(b)), that a default judgment may not exceed the amount alleged and/or prayed for. Moreover, Becker was also cited for the rule that the default judgment was subject to collateral attack for lack of personal or subject matter jurisdiction, the lower court having granted relief which it had no power to grant, a denial of due process.

The California Supreme Court in

Becker altered and/or amended the judgment to conform with law instead of voiding the judgment. And so in the instant case, the judgment was to be amended to conform with law granting Tabone the relief to which he was entitled without voiding judgment.

CONCLUSION

As seen from the above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 81-5229
Bkcy. No. 79-5766 JM
D.C. Nos. CV-80-1226-FW

In Re Bankruptcy of DAVID M. POSNER,

Bankrupt.

DAVID M. POSNER,

Plaintiff/Appellee,

vs.

SAM TABONE, Defendant/Appellant.

Nos. 82-5226 WMB
82-5227 WMB
Bkcy. No. 77-6515 WL
D.C. Nos. CV 80-1304 WMB
CV 80-2342 WMB

In Re Bankruptcy of

LEO CHARLES WEISKIRCHER, Bankrupt.

LEO CHARLES WEISKIRCHER, Plaintiff/
Appellee,

vs.

SAM TABONE, Defendant/
Appellant.

Appeal from The United States District Court for the Central District of California, Francis C. Whelan, District Judge, Presiding; Wm. Matthew Byrne, Jr., District Judge, Presiding; Argued and Submitted November 4, 1982

Before: FLETCHER and NELSON, Circuit Judges, and EAST,* Senior District Judge

PER CURIAM:

OPINION

The above two causes were consolidated on appeal for briefing, argument, and disposition.

Creditor Tabone in each case appeals a final District Court judgment affirming a Bankruptcy Court judgment that voided an in personam judgment granted against debtors Posner and Weiskircher in state court in violation of Bankr. Rule 401.[1/] We have jurisdiction under section 24 of the Bankruptcy Act of 1898 as amended

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

(the Act), 11 U.S.C. § 47(a)(1976) [2/]
and affirm both judgments.

BACKGROUND:

On January 14, 1975, Tabone brought suit against Posner and Weiskircher in state court on an unsecured promissory note. In aid of his suit, Tabone applied for a writ of attachment. The writ was granted and executed upon real property on October 12 and 13, 1976. Whether the debtors had any interest in the real property attached is not at issue.

Weiskircher filed a petition in bankruptcy on June 30, 1977, was adjudicated a bankrupt, and was discharged on October 4, 1977; Posner filed on May 30, 1979, was adjudicated, and was discharged on August 15, 1979. The schedules in each of the bankruptcy proceedings listed Tabone as a creditor but did not list the real properties under attachment as assets.

On July 6, 1979, Tabone obtained an in personam judgment by default in the state

court action against Posner and Weiskircher. [3/]

On January 16, 1980, Posner and Weiskircher commenced separate adversary proceedings in their respective bankruptcy proceedings against Tabone. In their respective complaints, Posner and Weiskircher sought to void the state court unrestricted in personam money judgment, which Tabone obtained against them after they had filed their respective bankruptcy proceedings wherein any alleged debt to Tabone was discharged.

In Posner's action against Tabone, the Bankruptcy Court entered judgment on March 18, 1980, determining the state court in personam judgment to be null and void. On May 19, 1980, the Bankruptcy Court in the Weiskircher case entered judgment, making an identical determination. Tabone appealed each Bankruptcy Court adjudication to District Court (D.C. No. CV 80-1226-FW, and D.C. No.

CV 80-2342-WMB). Each was affirmed: No. CV 80-1226-FW, on February 27, 1981; and No. CV 80-2342-WMB, on February 3, 1982. Tabone then took timely appeals to this court.

In the adversary proceedings, before both the Bankruptcy and District Courts, Tabone contended that the Bankruptcy Court was without jurisdiction.[4/] Tabone also argued, on the merits, that, since he was entitled to a restricted judgment limited to the real property previously attached, it would not serve the ends of justice to void the state court judgment and thereby to put him to the task of obtaining another judgment when the Bankruptcy Court or the state court could accomplish the same end by court order to that effect.[5/]

ISSUES ON REVIEW:

(a) Did the Bankruptcy Court or the District Court err in voiding the unrestricted in personam state court judgment

obtained by Tabone?

(b) Did the Bankruptcy Court or the District Court abuse its discretion by voiding the post-bankruptcy state court judgment rather than reforming or limiting it?

DISCUSSION:

Issue (a);

The state court action was on its face a suit against the bankrupts "founded upon an unsecured provable debt" and, as such, was stayed by Bankr. Rule 401. Tabone claims that at the moment the writ of attachment was executed on the real property the unsecured debt was transformed into a secured debt thereby removing the state court proceedings from the reach of Rule 401. The claim is fanciful at best.

The so-called pre-judgment attachment lien on real property creates an inchoate lien unperfected until entry of a valid final judgment. The perfected lien relates

back in priority to the date of the pre-judgment attachment, but it secures the judgment, not the unsecured provable debt. See United States v. Security Trust & Savings Bank, 340 U.S. 47, 50 (1950). Consequently, since Tabone's claims against Posner and Weiskircher upon which the writ was executed had not been reduced to judgment before May 30, 1979, Tabone's claims simply were not secured debts on the dates upon which Posner and Weiskircher's bankruptcy petitions were filed.

Tabone for some reason refused or at least failed to pursue the open route for him to protect his attachment lien that is specifically provided for in subsection (d) of Rule 401. The Advisory Committee's Note to Rule 401 states that the rule explicitly permits a creditor to secure relief from the stay of Rule 401 where a special justification exists and provides an expedited procedure for determining the propriety of granting such relief.

Since Tabone did not take the route provided by the rule, our inescapable conclusion is that Rule 401 stayed Tabone state court proceedings and the in personam judgment was taken in violation of the Rule.

Neither District Court erred in affirming the Bankruptcy Court's adjudication that the purported state court in personam judgment was null and void.

Issue (b):

Bankr. Rule 401 implements and makes automatic the provisions of section 11a of the Act, 11 U.S.C. § 29(a), which restrains, during bankruptcy, the continuation of a lawsuit against a bankrupt founded upon a claim from which a discharge would be a release, and section 14f of the Act, 11 U.S.C. & 32(f), which enjoins the institution or continuation of any action or the employing of any process to collect from the bankrupt any debt discharged in a previous bankruptcy proceeding. These

sections are central to the protection of the bankrupt. By restraining litigation outside the Bankruptcy Court, the bankrupt is able to deal with all of his creditors in one forum.[7/]

In light of the purposes which Congress intended to be served by those sections of the Act and the rules promulgated thereunder, the Bankruptcy Court's voiding of Tabone's judgment and its refusal to reform the judgment were, in the opinion of the District Court in the Weiskircher case, "clearly warranted." We agree.

As the District Court held in the Weiskircher case, a reviewing court may determine that the Bankruptcy Court abused its discretion only when there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of all the relevant factors. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Pue v. Sillas, 632 F.2d

74, 78 (9th Cir. 1980) (quoting In re Josephson, 218 F.2d 174 (1st Cir. 1954)).

The District Court's affirmance of the Bankruptcy Court's refusal to reform a void judgment obtained by a creditor in willful disregard of those portions of the Bankruptcy Act and Rules which are central to according a bankrupt the benefits of his discharge is not a clear error of judgment.

Tabone cites Becker v. S.P.V. Construction Co., 27 Cal. 3d 489, 612 P.2d 915, 165 Cal. Rptr. 825 (1980), for the proposition that the Bankruptcy Court somehow should have limited the judgment rather than voided it. The Becker case is not applicable to the issues here.

In Becker, the trial court had entered a default judgment for a sum in excess of what the plaintiffs had prayed for in their complaint. Thereafter, the defendants moved to vacate the default judgment on that ground, and their motion was granted.

The plaintiffs appealed, and the appellate court held that the trial court should have reduced the amount of the judgment to the amount of damages prayed for in the complaint.

The plaintiffs in Becker violated no substantive rule or statute in seeking a default judgment against the defendants. In the case before this court, every step Tabone took to push ahead with his lawsuit against Posner and Weiskircher after they had filed in bankruptcy violated the Bankruptcy Act and the Bankruptcy Rules.

The judgment Tabone obtained was not void because it contained some procedural error; it was voided because the state court's progress to judgment was violative of bankruptcy law. As the Bankruptcy and District Courts recognized, to reform Tabone's judgment and let him enforce it in any fashion at all would be to condone an injury to a system of bankruptcy law that places the burden upon the creditor

to come to the Bankruptcy Court before proceeding against the bankrupt on an unsecured provable debt, so that the Bankruptcy Court can circumscribe and limit the creditor's action and ensure that the benefits of the bankrupt's discharge will not be vitiated.

The Bankruptcy Courts did not err in refusing to reform or restrict the purported state court in personam judgment nor did the two District Courts err in affirming.[8/] The final judgments in the two District Courts, No. CV 80-1226-FW and No. CV 80-2342-WMB, are each affirmed.

Nos. 81-5229 and 82-5227 AFFIRMED;
No. 82-5226 DISMISSED.

FOOTNOTES

1/ Rule 401 states in pertinent part:

Petition as Automatic Stay of Certain Actions on Unsecured Debts

(a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act [11 U.S.C. § 35(a)].

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

* * *

(d) Relief from Stay. On the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy court shall set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

2/ Since the bankruptcy cases involved in this appeal were filed prior to the effective date of the Bankruptcy Reform Act of 1978, these cases are governed by the Act. All citations therefore refer to the Act.

3/ On September 28, 1979, some type of execution under the judgment was levied against the real property. The record is not clear as to whether the execution was had upon the apparent judgment lien or the perfected lien of the attachment.

4/ The Bankruptcy Court in each of these two cases properly exercised jurisdiction in voiding the state court judgment under § 2a(15) of the Act, 11 U.S.C. § 11(a)(15)(1976), which invests the bankruptcy courts with jurisdiction to "[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title."

5/ In Weiskircher's action against Tabone, the Bankruptcy Court on March 6, 1980 entered a preliminary injunction against Tabone preliminarily enjoining him from enforcing his post-bankruptcy, in personam money judgment against Weiskircher. Tabone appealed the grant of the preliminary injunction to the District Court on March 20, 1980 (D.C. No. CV 80-1304-WMB), which affirmed. In light of the disposition of the other issues on this appeal, Tabone's appeal from the District Court's affirmance of the temporary injunction is now moot. Appeal No. 82-5226 is dismissed, since the pre-

liminary injunction merged into the permanent injunction. See SEC v. Mount Vernon Memorial Park, 664 F.2d 1358, 1361-62 (9th Cir.), cert. denied, 102 S. Ct. 2037 (1982)

6/ The Note cites one example of a special justification: to enable a creditor who has obtained a pre-bankruptcy attachment to obtain a special judgment with a perpetual stay of execution against the bankrupt in order to perfect the creditor's rights against a surety. See Manufacturers' Finance Corp. v. Vye-Neill Co., 46 F.2d 146 (D.Mass. 1930), aff'd, 62 F.2d 625, 628 (1st Cir.), cert. denied, 289 U.S. 738 (1933). We do not here decide, however, whether Tabone possessed the special justification necessary to obtain relief under Rule 401(d) from the automatic stay provision.

7/ One treatise writer explains:

> Section 14f and h were meant to prevent that practice "of creditors pursuing bankrupts in state court, hoping they will somehow waive the benefits of their discharge by default or by not appearing at trial,as Tabone argues Weiskircher and Posner did] and to restrain, to the extent possible, creditors holding such debts from forcing the bankrupt into any other forum or proceeding.
>
> 1A J. Moore & L. King, Collier on Bankruptcy ¶ 14.69, at 1453 (rev. 14th ed. 1978).

8/ The extent of the judgments below, and of our affirmance, is merely to void Tabone's July 6, 1979, state court judgment. We express no opinion as to the validity of Tabone's purported attachment lien or as to whether it might now be brought to judgment. We do note, however, that in some cases a creditor who has secured execution of a writ of attachment against property of the debtor more than four months prior to the petition in bankruptcy may take a limited judgment against the attached property (but not against the person of the debtor or any other property), even though a discharge itself has been granted. See, e.g., Hill v. Harding, 130 U.S. 698, 703 (1889); Doe v. Childress, 88 U.S. (21 Wall.) 642, 646 (1874).